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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 135

FRANK PALKO,

Appellant,

vs.

STATE OF CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF FOR THE STATE OF CONNECTICUT.

LORIN W. WILLIS,
State's Attorney.
WILLIAM H. COMLEY,
Counsel for the
State of Connecticut.

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STATEMENT OF CASE.

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SUMMARY OF ARGUMENT.

I.

The privileges and immunities of the appellant have not been denied.

Page 8.

II.

The prohibition of the Fifth Amendment as to double jeopardy is not implied in the Fourteenth Amendment.

(1) This follows from the decisions as to other provisions of the first ten amendments holding that they are not implied in the 14th Amendment.

Pages 8—11.

(2) The Ulrich and Bennett cases do not meet the question presented in this record.

Pages 11—14.

(3) If the accused may have a judicial review of an unjust conviction upon condition that he waive the constitutional provision against double jeopardy the State should have the right to a judicial review of an unjust acquittal, with power to proceed until a final judgment is reached according to its own law and procedure.

Pages 14—18.

III.

The Connecticut statute does not offend any fundamental principle of justice.

(1) The rule as to double jeopardy is not a fundamental principle of due process just because it was a rule of the common law.

Pages 18—21.

(2) At common law the rule as to double jeopardy was not concerned with retrial after the reversal of a verdict of acquittal, since no review was provided in English practice. It was developed and applied in situations where there was an attempt

(a) to subject an accused to second punishment,

(b) to retry him while his innocence after a verdict of acquittal stood as res adjudicata,

(c) to place him at a disadvantage through unreasonable discharge of the jury by mistrial or disagreement.

Pages 21—25.

(3) The appellant fails to distinguish between settled rules and procedure in the Common Law of England and those fundamental conceptions of justice upon which all laws and procedure must rest.

Pages 25—29.

(4) The Connecticut practice is not a change in the English rule against double jeopardy. It is a change in the rule which denied to the Crown the right to seek a judicial review of a verdict based upon error in the trial.

Pages 29—33.

(5) The rule of double jeopardy as construed by the Connecticut Courts preserves the rights of the accused, protects him by proceedings essentially judicial in every sense of the word, and denies him only the right to avail himself of an advantage secured in contravention of the law of the land.

Pages 33—35.

STATEMENT OF CASE.

Appellant was indicted upon the charge of murder in the first degree. The State claimed that Palko, being on parole under sentence of imprisonment in New York, and overtaken in the perpetration of a crime in Connecticut, in order to avoid arrest, shot and killed a police officer.

He was put upon trial and the jury returned a verdict of murder in the second degree.

State v. Palko, 121 Conn. 670.

There was such grave doubt as to the validity of this verdict that the Judge who presided at the trial granted the State's motion for permission to appeal to the Supreme Court of Errors for the review of questions of law arising on the trial in accordance with Sec. 6494 of the General Statutes, Revision of 1930. The statute is as follows:

"Sec. 6494. **Appeals by the state in criminal cases.**

Appeals from the rulings and decisions of the Superior Court or of any criminal Court of Common Pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state with the permission of the presiding judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused."

Upon that appeal a new trial was ordered because of material errors which invalidated the first verdict.

State v. Palko, 121 Conn. 670.

Upon the second trial Palko was found guilty of

murder in the first degree and upon appeal the judgment of conviction was affirmed.

State v. Palko, 122 Conn. 529.

Of his assignments of error in that appeal the Court said:

> "In the assignments of error, it is claimed that the trial court erred in refusing to set aside the verdict; in its instructions to the jury; in certain rulings upon evidence; in refusing to grant a change of venue; and finally, that the second trial placed him twice in jeopardy for the same offense in violation of his constitutional rights under the state and federal Constitutions. The last two assignments are the only ones which are seriously pressed upon this appeal either in brief or in argument. As the case,—however, is a capital one, we have examined the entire record under all the assignments."
>
> Idem—p. 531.

Of his guilt there can be no doubt. In both trials there was but one indictment; according to Connecticut procedure there is but one judgment, and by the common law of that state, there has been but one jeopardy.

State v. Lee, 65 Conn. 265.
State v. Carabetta, 106 Conn. 114, 116.
State v. Muolo, 118 Conn. 373.

No fact nor exception can be found in the record which suggests that the accused in this case has not been given the protection of every right secured to him under the laws of the State of Connecticut.

The case turns upon the complaint of the accused that he has been twice placed in jeopardy for the same offense.

What constitutes double jeopardy is, in a criminal prosecution, within the jurisdiction of the state, a matter of judicial construction by the state courts. The rule of the English common law is not conclusive. It is followed where applicable to our social conditions. But it is not necessarily the common law of Connecticut.

State v. Muolo, supra p. 378.

Brown v. New Jersey, 175 U. S. 172.

It is the established law of Connecticut that in a criminal trial an accused person has no inviolable right to the immunity which has accrued to him through the fortuitous return by the jury of a verdict "tainted with illegality."

"First: 'That no one shall be put in jeopardy twice for the same offense, is a universal maxim thought worthy to be incorporated, to a certain extent, into the Constitution of the United States; and that an acquittal or conviction by a court having jurisdiction, on a sufficient indictment or information, is in all cases whatsoever a bar, is equally clear.' State v. Benham, 7 Conn., 418. This maxim is based upon a principle common to all systems of jurisprudence, i. e., the finality of judicial proceedings. Broom's Legal Maxims, p. 312. If questions once tried and determined could be again agitated at the option of the parties, one main object of any administration of justice would be defeated. The function of courts is to settle

controversies according to law. The object of settlement is secured by the principle of finality of judgments. Finis finem litibus imponit. The object of settlement in accordance with law the same in all cases, is secured by the correction of errors in the application of law in each case. Neither object is inconsistent with the other. The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential; but not more essential than the principle of justice. A final settlement is not more vital than a right settlement. The adjustment of these principles in the establishment of procedure by means of which the final judgment shall not only settle the controversy but settle it in accordance with law, is determined in each jurisdiction by considerations of public policy and not by fundamental principles of jurisprudence. The principle nemo bis vexare pro eadem causa, gives protection against a second judicial proceeding, and in the event of such proceeding gives to a party the right, in criminal cases, to the plea of autrefois acquit or autrefois convict, and in civil cases to the plea of res judicata; but the principle does not control the question whether the judgment pleaded in bar is in fact a legal and final judgment, and has no legitimate relation to the question whether existing procedure provides for correction of errors occurring in the trial.

"This distinction has been lost sight of in some cases which discuss the application of common law rules, or statutory provisions, to the correction

of errors in criminal causes; and owing to the confusion of principle with practice, a theory seems to have at times prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from established rules of law binding on all other citizens; and therefore a procedure which proves incompetent to the correct application of legal principles in criminal trials can be changed like any other rule of practice when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence that cannot be altered when the change may tend to secure his just punishment. It needs no argument to dispel such an illusion, or to demonstrate that the natural rights of the individual as well as the interests of public order are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy, but settle it in accordance with law.

"Judicious legislation for securing a full, fair and legal trial of each criminal cause, is not in derogation, but in protection, of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense."

State v. Lee, supra.

Counsel for the accused, in their brief, refer in terms of strong disapproval to the opinion of Mr.

Justice Homersley in State v. Lee. It is worth noting, however, that in the Kepner case, in a dissenting opinion, this case was referred to as "the well-reasoned decision."

Kepner v. United States, 195 U. S. 100, 135.

Again in their brief, counsel speak of the policy of the State of Connecticut *in respect of* appeals by the State as one which cannot be reconciled with fundamental principles of justice. Of this policy, however, Mr. Justice Holmes wrote in the Kepner case:

> "If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected through the Constitution from being tried again. He would no more be in jeopardy a second time when retried because of a mistake of law in his favor than he would be when retried for a mistake that did him harm."
>
> Page 135.

In view of the too ready assumption in behalf of this accused that the so-called rule against double jeopardy and the policy which forbade an appeal either to the state or to the accused in criminal cases are one and the same thing, it is well to recall what was said in the same dissenting opinion about the subject:

> "It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its begin-

ning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man had already been tried once. But there is no rule that a man may not be tried twice in the same case."

Kepner v. United States at page 134.

It is but natural that this accused should dispute the soundness of the *conclusions* reached by the Supreme Court of Errors of the State of Connecticut in the Lee case, and contend that Mr. Justice Holmes mistook the law in his analysis of the same subject. But to declare that a construction of law applicable to questions of human life and liberty and thus approved by him, is a sample of "contortions in logic" and "legal jiu-jitsu" and a shocking denial of justice, is to abandon all contact with reality.

The decision in Kepner v. United States, 195 U. S. 100 will not avail plaintiff in error unless he can maintain one of three propositions:

(1) That the procedure in the State Court deprives him of the privileges and immunities guaranteed in the Fourteenth Amendment.

(2) That the precise prohibition of the Fifth Amendment as to jeopardy is implicit in the due process clause of the Fourteenth Amendment.

(3) That the procedure in which Palko was convicted is an arbitrary exercise of the powers of government unrestrained by established principles of private right and public justice.

Leeper v. Texas, 139 U. S. 462.

I.

The conviction of Palko does not deprive him of the privileges and immunities secured by the 14th Amendment.

Since the Slaughter House cases and to this day it has been taken as settled that rights under the common law such as those embodied in the first ten amendments to the Constitution are not privileges appertaining to national citizenship referred to in the 14th Amendment.

Slaughter House cases 83 U. S. 36, 75 (16 Wall.)

Colgate v. Harvey, 296 U. S. 404, 431.

II.

The prohibition against double jeopardy contained in the 5th amendment was not made effective as a limitation on the power of the state by the due process clause of the 14th amendment.

This has been settled as to the following provisions of the first eight amendments, every one of which has at some time been referred to as a fundamental principle of the common law.

(1) As to trial by jury.

(2) As to presentment by a grand jury.

(3) As to unreasonable searches and seizures.

(4) As to compulsory self incrimination.

(5) As to cruel and unusual punishment.

Maxwell v. Dow, 179 U. S. 581, 597.

Walker v. Sauvinet, 92 U. S. 90.

Hurtado v. California, 110 U. S. 516.
Weeks v. United States, 232 U. S. 383.
Twining v. New Jersey, 211 U. S. 383.
In re Kemmler, 136 U. S. 436.

If there is merit in the claim of this accused it leads to the conclusion that, if placing him twice in jeopardy, as that phrase has been construed in the 5th Amendment, denies due process under the 14th Amendment, then the question of what constitutes double jeopardy becomes in every case a Federal question. Any ruling on this subject by a state court, under its own statutes or constitution or in the performance of its own duty to declare the common law, would be the subject of review in this court. Even the question whether a state court has acted reasonably in declaring a mistrial would upon a second trial become a Federal question.

Little would be left of the power of the States to construe their own laws and determine their own several policies in the administration of criminal law.

Shoener v. Pennsylvania, 207 U. S. 188.
Howard v. Kentucky, 200 U. S. 164.
In re Converse, 137 U. S. 624.

It is apparent that the decisions in the several jurisdictions, state and Federal, differ as to the scope of the words "double jeopardy." Ball v. United States, 163 U. S. 662. But it has never been held that the failure of a state court to adopt the Federal rule as to double jeopardy would be a denial of due process of law.

In the Ball case the question of double jeopardy

under the Fifth Amendment was considered as applied to the question whether a verdict of acquittal upon an indictment, bad upon its face, would bar a second trial upon a good indictment.

It was pointed out that the prevailing rule in England and among the States would permit such retrial. For the Federal jurisdiction it was held that the 5th Amendment forbade such retrial. If the claims of this accused are sustained, in those States which follow the English rule, such a retrial would be a denial of due process under the 14th Amendment; for obviously if the 14th Amendment forbids that an accused be twice placed in jeopardy for the same offense, the question whether in a given case there has been double jeopardy depends upon the construction adopted in the Federal jurisdiction.

And the accused must also maintain that although the double jeopardy rule is implied in the 14th Amendment because it was a settled rule of the common law of England in the early Eighteenth Century, yet the prevailing rule of the States as to double jeopardy in the situation presented by the Ball case is a violation of the Due Process clause of the 14th Amendment **because** it follows the English Law.

In Pennsylvania the Supreme Court of that State in an early case held that the plea of former jeopardy was applicable only in capital cases.

McCreery et al v. Commonwealth, 29 Pa. 323.

This construction of the Pennsylvania constitutional provision was later reaffirmed.

Commonwealth v. Simpson, 310 Pa. 380.

Such is not the Federal rule under the Federal Constitution.

The Simpson case was a trial and conviction of the crime of murder, (not first degree). Will it be said in this case there was a denial of due process in violation of the 14th Amendment? There was a dissenting opinion in which it was argued that a different construction should be put upon the constitutional provision against double jeopardy. But nowhere in the dissenting opinion was it suggested that there had been a denial of due process of law.

Counsel for the accused upon their brief cite two cases in support of their proposition that the Federal rule as to double jeopardy is necessarily implied in the terms of the 14th Amendment. Ex parte Ulrich, 42 Fed. 587 did not involve the validity of a statute giving the government the right to take exceptions, and conferring upon the Courts the power, after proper judicial inquiry, to set aside a verdict of acquittal. On the contrary it appears that the accused did not wait to exhaust his remedy in the State Court, but proceeded at once to the Federal Court.

The facts in that case were construed by the Court as an abuse of its discretion by the trial court in needlessly postponing a trial, discharging a jury, and again placing the accused upon trial without any apparent justification for such conduct, and to the obvious prejudice of the man on trial.

Assuming that the disposition of the Ulrich case was correct in that there was a denial of due process, the decision should rest, not upon the theory that it violated the Federal rule against double jeopardy,

but that it was an **abuse** of the undoubted power of the state to place an accused twice in jeopardy where the ends of justice would otherwise be defeated.

It resembles those cases in this Court in which it has been pointed out that Constitutional authority upon the part of the State to compel the accused, under proper judicial direction, to testify in proceedings directed against him (the limitation of the 5th Amendment being not implied in the 14th Amendment) did not mean that the State authorities might coerce a prisoner by brutal force into the making of an involuntary confession for the purpose of furthering the chances of conviction in an impending trial.

Furthermore it is worthy of note that many of the quotations cited in the Ulrich case to support its conclusions as to the scope of the 14th Amendment relate, not to a retrial, but to a second punishment.

And it is noteworthy in this opinion that the assumption is made that there is to be found in Magna Charta a provision "that one acquittal or conviction should satisfy the law." (page 590) The fact is that neither in Magna Charta nor in any of the subsequent Bills or Petitions of Right, nor even in the Virginia Resolutions adopted on the eve of the separation of the Colonies, is any reference made to the so-called rule against double jeopardy. On the other hand, in each one of them is to be found the guaranty of the right of trial by jury, a guaranty which is not implied in the 14th Amendment.

The accused cites also In Re Bennett, 84 Fed. 324. That case decided only that the petition for a writ of

habeas corpus should be denied because he had not exhausted his remedy in the State Courts. The Court, however, expressed the opinion that in a criminal trial conviction of a lesser offense under the indictment is an acquittal of any greater offense included in the charge, and that upon a retrial secured by the motion of the accused, he cannot again be tried for the greater offense.

This is unquestionably the law of the land in many states:

Cates v. Com., 111 Va. 837.
People v. Cignarale, 110 N. Y. 23.
Ex parte Spiney, 175 Ala. 43.
Com. v. Deitrick, 221 Pa. 7.
State v. Naylor, 28 Del. 99.

A different rule prevails in the Federal jurisdiction.

Trono v. United States, 199 U. S. 520.

From the opinion in this case four Justices dissented.

Four years later, however, the same question being presented upon a conviction of murder, the Court said:

"The contention is absolutely without merit."
Brantley v. Georgia, 217 U. S. 284.

The appellant points out that the accused, under this rule, waives the constitutional provision against double jeopardy. But this doctrine of waiver (of a right, according to the accused, so vital to liberty that a judicial proceeding, unrestrained by it, is a travesty upon justice) was no part of the settled law

and procedure of England. It is not based (as in the Georgia case) upon any expressed condition annexed to the right of appeal. It is not claimed that the accused or his counsel, in the Trono case at least, was aware of the waiver.

The decision was no more than an application of the general rule that the accused may be twice put in jeopardy where the ends of justice demand it. The implication of this decision can lead to but one result as applied to criminal proceedings in a State Court.

The accused upon conviction, has no Constitutional right of appeal. The State may grant or withhold such right or annex to it such terms and conditions as legislative policy may indicate.

The doctrine of waiver, therefore, is in effect that a statute, giving the accused, upon conviction, the right to appeal, carries with it the implied condition that if he succesfully exercises that right, he waives the Constitutional provision as to double jeopardy so far as applicable to a new trial.

> "In those states where statutes have been passed declaring that if, on motion of the accused, a new trial is granted, it shall be a complete new trial, we have found no instances in which such a statute has not been upheld. Enactments of that character are, in substance, merely legislative declarations of provisions that when the accused moves for and obtains a new trial, he waives any right to set up former jeopardy to prevent a complete new trial, or estops himself from so doing."
>
> Brantley v. State, 132 Georgia 573.

If the state may say to a person unjustly convicted, that he may not appeal from the judgment, however iniquitous, except upon condition that he waive his constitutional guaranty against double jeopardy, it would seem to be well within Constitutional authority for the State of Connecticut to hold that a proceeding such as the record discloses in the case at bar does not subject the accused to double jeopardy.

Surely it makes of the criminal law a haphazard affair when it sends one man to the gallows for murder and constrains itself to let another, equally guilty, go free merely because in the first instance the law was duly administered, and in the second instance the presiding judge mistook the law.

As against the severe strictures upon the Connecticut decisions and the policy of the Connecticut Legislature we respectfully submit that the State of Connecticut has kept well within the limitations defined in the case of Leeper v. Texas, 139 U. S. 462, in which case it was said:

> "By the 14th Amendment, the powers of the states in dealing with crime within their borders are not limited, except that no state can deprive particular persons or classes of persons of equal and impartial justice under the law; that law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state, the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the

established principles of private right and distributive justice."

The extent to which the Federal jurisdiction would be necessarily enlarged if the accused is upheld upon this point can be easily illustrated.

One acquitted upon an indictment and brought to trial upon another charge connected with the same transaction sets up the plea of former acquittal and invokes the doctrine of double jeopardy. The Constitution of his state may contain a clause against double jeopardy, but the task of the State Court will be, not to determine what constitutes double jeopardy under the State Constitution and the decisions of State Court, but what constitutes double jeopardy under the Federal Constitution and the Federal decisions. A denial of the claims of the accused in such a case would involve a Federal question. It might arise in a case involving his life, or in a misdemeanor of little consequence.

An accused is prosecuted under a Constitutional provision which limits the rule against double jeopardy to felonies. This provision, however, and the interpretations placed upon it in the State Courts is not of the slightest consequence if the law of the land involves the provision against double jeopardy as defined in the Federal Constitution and construed in the Federal Courts.

The State may enact a statute endeavoring to provide some sort of a Restatement of the local law involving mistrial. It would make no difference what the State Constitution provides as to double jeopardy nor what the decisions of the

State Court have been. In every case the question whether, after a mistrial is declared in accordance with the provisions of the statute, a new trial may be had, becomes a Federal question. The construction of the provision of every State Constitution where occurs a provision as to double jeopardy is, upon the denial of the construction claimed by an accused in a criminal trial, not a State, but a Federal question.

It is of no particular significance that not until seventy years after the adoption of the 14th Amendment does a case of this description come before this Court. But it is significant that no case has arisen in this Court since that date in which the validity of a State decision as to double jeopardy under its own Constitutional provision has been presented here as a Federal question under the 14th Amendment, despite the many differences which exist between the State and Federal rules on that subject.

Counsel for the accused in their brief criticise at some length the validity of the decision in State v. Lee under the constitution, statutes and earlier decisions of Connecticut.

Such criticism is quite beside the point. Under the constitution the state courts determine for their jurisdiction the construction and effect of their statutes and common law.

Oregon v. Ingraham, 63 Federal (2nd) 417
Affirmed 290 U. S. 613.

Marshall v. New York, 254 U. S. 380.

Lee v. Bickall, 292 U. S. 415.

In People ex rel. Cusick v. Whipp, 73 Federal (2nd) 254, the circuit court of appeals in a habeas corpus proceeding said,

> "the reluctance with which the Supreme Court of the United States will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has frequently been stated in the opinion of the court on that subject".

Gatewood v. North Carolina, 203 U. S. 531.

Dickson Crucible Co. v. Paul, 167 Federal 784.

Price v. People, 238 U. S. 446.

Glenn v. Field Packing Co., 290 U. S. 117.

III.

The Connecticut Statute does not offend any fundamental principle of justice.

The mere fact that the rule against double jeopardy was an established rule of the common law does not make it a fundamental principle of justice. Against a similar claim this Court has said that the procedure of the first half of the seventeenth century ought not to be "fastened upon the American Jurisprudence like a straight jacket only to be unloosed by Constitutional amendment."

Twining v. New Jersey, supra, p. 101.

There are certain rules which, in the historical view of the common law, have been regarded as fundamental because they are traceable in Magna Charta, in the Petition of Rights in the reign of

Charles I and the Bill of Rights of the time of William and Mary, such as trial by jury. No mention of double jeopardy is found among these, and none of them has been held to be implied in the due process clause.

The claim was recently made in this Court that the punishment of a person for an act in violation of law, when he is ignorant of the facts making it so, is a denial of due process of law. Mr. Chief Justice Taft said:

> "While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it, (Reg. v. Sleep, 8 Cox C. C. 472, Leight & C. C. C. 44, 30 L. J. Mag. Cas. N. S. 170, 7 Jur. N. S. 979, 4 L. T. N. S. 525, 9 Week Rep. 709) there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement."

United States v. Balint, 258 U. S. 250.

There is no theory of English constitutional law which would support the claim that the rule as to scienter as a necessary element in the indictment was any less fundamental than the rule as to double jeopardy.

The idea that one rule of the English common law was more fundamental than another has no place in English jurisprudence.

This appeal in the last analysis rests upon the proposition that the rule as to double jeopardy was **more fundamental** than the rule as to scienter, the rule as to trial by jury, the rule as to presentment by the grand jury, as to self incrimination, as to the conviction of the principal before the trial of an accessory, than a hundred other long established rules of the common law all of which have been abandoned by the states or materially altered as times have changed.

In fact no rule of the common law, just because it was a rule of the common law, is essential to due process.

The State of Connecticut was free to adopt the Civil Law so far as the due process clause is concerned.

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so."
>
> Missouri v. Lewis, 101 U. S. 32.
> Hallinger v. Davis, 146 U. S. 314.

The prohibition against double jeopardy in the 5th Amendment is absolute in terms. But even this absolute prohibition has its exceptions, and it has never been held that in these there was a denial of due process.

Commonwealth v. Purchase, 19 Mass. 524.

A man is in jeopardy when he goes on trial before a jury in a court having jurisdiction upon a valid indictment. The jeopardy begins with the trial.

Coleman v. Tennessee, 97 U. S. 509.

But if the jury disagree, and the trial Court discharges them, the accused may again be placed in jeopardy.

United States v. Perez, 22 U. S. 579.

If one considers the reasons so often given for the maxim, that the accused ought not to be brought back to a second trial when perhaps he has once expended all his means, lost track of his witnesses, and otherwise incapacitated himself to meet again the exigencies of a trial, of what avail is it to him in such circumstances that the judge acted in the exercise of a reasonable discretion.

It is now settled in the Federal jurisdiction that an accused may again be placed in jeopardy, even in a capital case after a verdict of conviction, if upon his appeal the verdict is set aside, because he is conclusively presumed to have waived the Constitutional provision, although such a waiver of this or any other privilege in a criminal trial was unknown to the common law.

Trono v. United States, 199 U. S. 521.

Nor are the exceptions limited to a disagreement. The sickness of a juror or of the judge, the misconduct of the accused or of counsel, in short any misadventure in the course of trial which is reasonably calculated to prevent the attainment of a proper verdict, has been held sufficient reason for placing the accused again in jeopardy.

Courts of justice may discharge a jury from giving any verdict, and order a new trial by another jury, whenever in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, **or the ends of public justice would otherwise be defeated.**

Thompson v. United States, 155 U. S. 271, 274.

Under the statute in question the State of Connecticut has declared it to be a matter of public policy that a verdict of acquittal may be the subject of review; that after judicial inquiry it may be set aside, if it is found to be affected by errors of law committed by the trial judge; and that the accused may again be put to trial, **in order that the ends of justice may not be defeated.**

It would be assumed that the appellate court which reviews the proceedings will not order a new trial unless the errors are such that, in the opinion of the Justices, taking all the circumstances into consideration, there is manifest necessity for a re-trial, lest the ends of public justice be otherwise defeated.

The statute, within a legitimate field of legislation, is but another instance that the public policy of one

generation may not, under changed conditions, be the public policy of another.

Funk v. United States, 290 U. S. 371.

Holden v. Hardy, 169 U. S. 366.

McKane v. Durston, 153 U. S. 867.

Hallinger v. Davis, 146 U. S. 314.

This Court has often been called upon to reverse judgments in the Federal Courts in criminal cases because of violation of the jeopardy clause of the Fifth Amendment. But in none of those cases was it suggested that there had been a denial of due process.

In Vol. 19 L. R. A. 342 and L. R. A. 1915 F, 1093, are gathered many cases from State jurisdictions denying the right of the State to order a new trial after acquittal where there is a constitutional provision forbidding the State to place an accused twice in jeopardy; but in none of these cases can there be found a suggestion that such retrial would be a denial of due process.

In the Kepner case Mr. Justice Holmes in dissent urged that the construction of the common law rule in State v. Lee be adopted. In the majority opinion it is very clearly indicated that the Connecticut decision would be justified by the absence of any prohibition in the State Constitution.

"The case of the State v. Lee, 65 Conn. 265, 27 L. R. A. 498, 48 Am. St. Rep. 202, 30 Atl. 110, in the reasoning of the Court seems opposed to this view. But no reference is made in the course of the opinion to any constitutional requirement

in Connecticut as to double jeopardy. An examination of the Constitution in that State and amendments as published in General Statutes of Connecticut, Revision of 1902, discloses no provision upon the subject of jeopardy, and we conclude there is none."

Kepner v. United States, supra, p. 132.

It is difficult to find in these carefully chosen words any suggestion that a new trial on the State's appeal, in the absence of prohibition in the State Constitution, would violate the due process clause of the Fourteenth Amendment.

In an earlier case, Mr. Justice Gray, discussing the right of the prosecution to appeal said;

"In many of the States, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error in criminal cases has been given to the State by positive Statute . . . . In either case the defendant having been once put upon his trial and discharged by the Court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority has made express provision for a review of the judgment at the instance of the government."

United States v. Sanges, 144 U. S. 318.

In a more recent case the Court said:

"An occasion for the defense of double jeopardy may occur if the State of Minnesota should proceed criminally against the plaintiff in error. We do not mean to say however, that it will be justified. We do not mean to say that the state law

subjects an offender against its provisions to a double jeopardy. Nor do we mean to imply that even if it have such effect, the 14th Amendment of the Constitution of the United States may be invoked against it."

Shevlin-Carpenter Co. v. Minn., 218 U. S. 57, 67.

It is assumed in the argument for this accused that the English common law denied an appeal in criminal cases because the rule against double jeopardy forbade it.

But while this might hold good of an acquittal it does not explain the denial of an appeal in case of conviction. It would be an inhuman rule that a man must submit to an unjust conviction because it would be a violation of his rights to try him again.

It is more reasonable to conclude that the denial of an appeal was a matter of policy which could not see in such appeals any advantage to the public interest.

It has been said that one test applied to determine whether due process has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statutory law of England before the Declaration of Independence.

Powell v. Alabama, 287 U. S. 45.

Because it was settled usage in England that no appeal was allowed from an acquittal it is argued that Palko has been denied due process of law.

This argument falls within the criticism recently expressed by this Court.

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a Court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence."
>
> Snyder v. Massachusetts, 291 U. S. 97, 114.

The facts in the Powell case disclose something more than a departure from long established rules of common law. They disclose a departure from settled usage and procedure in flagrant violation of the fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

If this record showed that Palko had been put to trial a second time under a statute which provided that the **prosecutor** might, if dissatisfied with the first verdict, set it aside and again proceed against the accused for the same offense, it might be held on the authority of the Powell case, that such procedure was a departure from settled usages and procedure; but the unconstitutional departure would be, not from the common law rule against double jeopardy, but from the fundamental requirement of due process that before the first verdict was set aside there should be notice and an opportunity to be heard and a proceeding judicial in nature.

"As to the 'due process of law' that is required by

the 14th Amendment it is perfectly well settled that a criminal prosecution in the Courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, is due process of law so long as it includes notice and a hearing or an opportunity to be heard before a Court of competent jurisdiction according to established modes of procedure."

Frank v. Mangum, 237 U. S. 309, 326.
Brown v. New Jersey, 175 U. S. 172.
Caldwell v. Texas, 137 U. S. 647.

These Palko was entitled to claim in respect of any proceeding affecting the verdict which was rendered in the first trial, and they have been fully accorded him in the spirit of the law as well as in the letter.

The departure of which Palko complains is the departure by the State of Connecticut from an ancient practice by which this accused under the constitution of the United States claims as a sort of mediaeval sanctuary the privilege of sheltering himself behind a verdict to which under the law of the land he was not entitled.

Neither constitutional limitations nor the essentials of orderly procedure in criminal prosecutions require that the State of Connecticut subordinate its legislative policy to such a claim. In Congress and in the legislatures of many states there has been strong support for the allowance of an appeal.

In states whose constitutions contain the prohibition against double jeopardy no progress has been made.

Vermont, however, free under her constitution to adopt this rule of policy, has conferred upon the state the right to appeal and upon the courts the power to order a new trial.

State v. Felch, 92 Vt. 477.

In that case the State of Vermont recognized the difference between a departure from established rules of the common law and a departure from settled usages and procedure which would violate fundamental principles of right and justice.

> "The question before us, then, comes to this: Does this statute affect the respondent's fundamental rights? That it violates the rules of the ancient common law, that it infringes rights specified in Magna Charta, that it reverses the policy of the State in criminal matters, and imparts something of a shock to a mind trained in the common law—these considerations are not controlling."

State v. Felch, supra.

The difference between established rules of the common law and settled principles of law and justice was stated by Mr. Justice Hamersley in State v. Lee.

> "Regulations for enforcing the correct application of law in all criminal trials are essential to the administration of justice, and a statute prescribing procedure for that purpose and requiring the verdict of the jury to be reached in accordance with the settled principles of law and justice before it

can support a valid judgment, is not in derogation of any fundamental doctrine of our common law, nor inconsistent with the principle that enforces the conclusiveness of a valid and final judgment."

State v. Lee, supra, p. 277.

It may with good reason be asked what was the established usage or procedure from which, it is charged, the State of Connecticut has departed.

If the criticism is limited to the point that it was the established usage of the common law that no appeal or writ of error was allowed the Crown in criminal trials the point must be admitted. It is equally true that a hundred other usages, equally well established, have been so far departed from, that a man whose learning in the law, however profound, had not gone beyond the first half of the eighteenth century, would be scarcely fitted to practice in this Court.

Morever, if it is claimed that we have departed from the established usages of the common law as to double jeopardy as they were established in England at the time of our Independence, the answer is that no state under the 14th Amendment ought to be debarred from legislating upon an important question of policy because of a rule of the common law of such uncertain implications.

Wherever the jeopardy clause appears in Federal or State Constitutions, its meaning has in our American Courts been clearly defined for each jurisdiction.

But since it does not appear in the Connecticut Constitution and we are to deal with it as an established English usage, it must be admitted that it is difficult to find any general agreement as to what it imported.

It is curious to note, however, that as late as 1865 in England Mr. Justice Blackburn spoke of it as being no more than an application of the doctrine of res adjudicata.

> "When the jury have once found their verdict of conviction or acquittal, the matter has become res judicata, and after that there can be *no* further trial. If after the jury have found their verdict, the Court were to issue process for the purpose of summoning another jury to try the question again, on the same indictment on which the jury have already pronounced a verdict, such a proceeding would be erroneous, and the proper remedy would be to bring a writ of error; the error being, that whereas there was an acquittal or a conviction which terminated the whole question, process had issued to a fresh jury. **If, instead of proceeding on the same indictment, a second indictment were found, it would be necessary for the prisoner to plead a plea of autrefois acquit, or autrefois convict, as the case might be, and that would raise the same question of law; but in each, the question would be, had the matter been so determined by the jury as to have become res judicata?** (italics ours). Now it is material to recollect that, in the case of a second indictment being found, the pleas which I have mentioned and which are well known to the law may be pleaded

in bar. No other pleas have ever been pleaded, except the strange pleadings in the case of Conway and Lynch v. Reg. (1), and which would have been bad for many reasons, if all objections of form to them had not been waived. Except in that solitary case there never has been a plea to the effect that the prisoner had been given in charge to a jury, and the jury had come to no conclusion; the object of pleading the plea being that it should have the effect of preventing the prisoner from being tried again, just as if the jury had pronounced a verdict finding him guilty or not guilty. **The fact that no such plea can be found in any report is a strong argument that an abortive trial is no bar to a second indictment for the same offense.** (italics ours) If instead of proceeding upon a fresh indictment a second jury process were issued upon the same indictment, and the question were raised on the record, whether the proceeding to get together a second jury after the matter was not disposed of by the first, was correct, the question would be exactly the same as if the matter had been pleaded to a second indictment. Would the fact that the prisoner had been given in charge to the jury, who came to no conclusion for the reasons stated upon the record, have afforded a bar to the second indictment? If it would, the proceedings to summon a second jury would have been erroneous, and the verdict would have been bad; but if the facts would have afforded no defense to the second indictment for the same matter, I cannot see how

on any principle of law it can furnish a ground of error."

Winsor v. The Queen, Queen's Bench Cases, Law Reports, Vol. 1 (1865-6) 29 Victoriae, p. 313, 314.

To the same effect is the comment in United States v. Oppenheimer, where, speaking of the finality of the plea of former acquittal, the court said:

"In this respect the criminal law is in unison with that which prevails in civil proceedings."

United States v. Oppenheimer, 242 U. S. 85, 88.

The various Latin maxims which have from time to time been referred to as the basis upon which the doctrine of former jeopardy rests suggest that it was concerned with double punishment rather than with the burden of a second trial.

"The provisions of the common law and of the Federal Constitution that no man shall be twice placed in jeopardy of life or limb, are mainly designed to prevent a second punishment for the same crime or misdemeanor."

Ex parte Lange, 85 U. S. 163.

Granted, as Mr. Justice Hamersley points out, that dicta to the contrary may be found, it is significant that in the view of one of England's foremost judges the plea of autrefois acquit is merely one of res adjudicata; and the doctrine of double jeopardy is one deduced from the universal maxim of res adjudicata to be applied in cases where, there having been one trial **without** a verdict, a second would be oppressive.

The conclusion that subsequent to our Independence the adjudications in our courts under Constitutional provisions as to double jeopardy have been carried beyond the English precedents, although the conditions in England which gave the rule against double jeopardy its importance have never existed here, was expressed by the Supreme Court of West Virginia.

> "The principle has received sanction as a fundamental one to a degree unknown in the English law."
>
> Ex parte Borne, 76 W. Va. 360.

In the discussion of double jeopardy it is noteworthy that the question of the guilt or innocence of the accused is quite irrelevant. And this, historically considered, is logical.

For in the days when the word "jeopardy" began to appear in the judicial reports, an accused was indeed in jeopardy. It was an apt description of the plight of the prisoner in a procedure which to us seems almost savage. Once a jury had declared him innocent, whether rightly or wrongly, it seemed a pity that his life should again be put to that dreadful hazard.

But times have changed. The accused is allowed to appeal from an unjust conviction. Courts have been empowered to set aside such a verdict and to order a new trial. And judges, no less humane than Hale or Coke, have had no compunction about introducing something unheard of in an English criminal trial—the doctrine that upon such a trial the accused has waived his constitutional right to plead

double jeopardy. In that aspect the terrifying jeopardy of the common law no longer exists. All that he waives is an ancient formula. His only jeopardy is that truth and justice will prevail.

But where, as in this case, the State has appealed; and after a fair, judicial inquiry, *the verdict* has been set aside and a new trial ordered; then the doctrine reassumes its original significance; the very word revives the ancient scene in which a helpless and abandoned wretch contends against fearful odds; and in the name of a merciful tradition, the accused begs to be saved from a second jeopardy—although it still remains true that the only jeopardy in which he stands is that truth and justice may at last prevail to his undoing.

It is argued that the Connecticut procedure will expose accused persons to those tyrannies which the rule against double jeopardy was designed to restrain.

But those who express these fears are seldom heard to be precise as to what tyrannies they have in mind.

To say that appeals by the state under the restraints of judicial review can be employed for purposes of persecution or to the prejudice of innocence is to prophesy the subserviency of the state courts and the disappearance of the tradition of judicial responsibility. When that day comes the ancient maxims of the common law will avail nothing; and nothing will more surely serve to hasten the day of lawless power than a present failure of the law to enforce its mandate against those who defy it.

In the Perez case this Court rejected the claim that the necessities of an orderly administration of the law should yield to the absolute prohibition of the jeopardy clause in the 5th Amendment, and in reply to the claim that the allowance of so wide a discretion to the courts must end in the denial of justice to the innocent, Mr. Justice Story said:

> "the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the judges under their oaths of office."

United States v. Perez, supra,
Commonwealth v. Purchase, supra.

The decision in the Lee case is a sound exposition of the common law. It contains no disparagement of the spirit of ordered liberty which enobled the law of England, nor of the judges who placed their own lives in jeopardy to invoke it against the threat of Stuart despotism. But this is another day and another generation; and as in those days the problem was to secure justice against political autocracy, so in this day a very pressing problem is how better to secure decent, law abiding citizens against the growing threat of daring and defiant crime.

We respectfully submit that the statute condemned by this accused is an intelligent effort toward a solution of that problem.

LORIN W. WILLIS,
State's Attorney.

WILLIAM H. COMLEY,
Attorney for the State of Connecticut.

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SUPREME COURT OF THE UNITED STATES.

No. 135.—October Term, 1937.

Frank Palko, Appellant, vs. State of Connecticut. } Appeal from the Supreme Court of Errors of the State of Connecticut.

[December 6, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the state of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin.[1] Public Acts, 1886, p. 560; now sec. 6494 of the General Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State* v. *Palko,* 121 Conn. 669. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

1 "Sec. 6494. *Appeals by the state in criminal cases.* Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

A statute of Vermont (G. L. 2598) was given the same effect and upheld as constitutional in State v. Felch, 92 Vt. 477.

Other statutes, conferring a right of appeal more or less limited in scope, are collected in the American Law Institute Code of Criminal Procedure, June 15, 1930, p. 1203.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction (122 Conn. 529), adhering to a decision announced in 1894 (*State* v. *Lee,* 65 Conn. 265) which upheld the challenged statute. Cf. *State* v. *Muolo,* 118 Conn. 373. The case is here upon appeal. 28 U. S. C., § 344.

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any state deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in *Dreyer* v. *Illinois,* 187 U. S. 71, 85, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in *Kepner* v. *United States,* 195 U. S. 100, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new and independent case. It forbade jeop-

ardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. *Trono* v. *United States,* 199 U. S. 521. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U. S. 100, 134, 137) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels (*Snyder* v. *Massachusetts,* 291 U. S. 97, 114) must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado* v. *California,* 110 U. S. 516; *Gaines* v. *Washington,* 277 U. S. 81, 86. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112. Cf. *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi,* 297 U. S. 278, 285. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This

court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker* v. *Sauvinet,* 92 U. S. 90; *Maxwell* v. *Dow,* 176 U. S. 581; *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 208; *Wagner Electric Co.* v. *Lyndon,* 262 U. S. 226, 232. As to the Fourth Amendment, one should refer to *Weeks* v. *United States,* 232 U. S. 383, 398, and as to other provisions of the Sixth, to *West* v. *Louisiana,* 194 U. S. 258.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress (*De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Herndon* v. *Lowry,* 301 U. S. 242, 259) or the like freedom of the press (*Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota,* 283 U. S. 697, 707), or the free exercise of religion (*Hamilton* v. *Regents,* 293 U. S. 245, 262; cf. *Grosjean* v. *American Press Co., supra; Pierce* v. *Society of Sisters,* 268 U. S. 510), or the right of peaceable assembly, without which speech would be unduly trammeled (*De Jonge* v. *Oregon, supra; Herndon* v. *Lowry, supra*), or the right of one accused of crime to the benefit of counsel (*Powell* v. *Alabama,* 287 U. S. 45). In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments [2] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them

[2] First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi, supra,* p. 285; *Hebert* v. *Louisiana,* 272 U. S. 312, 316. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining* v. *New Jersey, supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether.[3] No doubt there would remain the need to give protection against torture, physical or mental. *Brown* v. *Mississippi, supra.* Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining* v. *New Jersey, supra,* p. 99.[4] This is true, for illustration, of freedom

[3] See, e. g. Bentham, Rationale of Judicial Evidence, Book IX, Pt. 4, c. III; Glueck, Crime and Justice, p. 94; cf. Wigmore, Evidence, vol. 4, § 2251.

Compulsory self-incrimination is part of the established procedure in the law of Continental Europe. Wigmore, *supra,* p. 824; Garner, Criminal Procedure in France, 25 Yale L. J. 255, 260; Sherman, Roman Law in the Modern World, vol. 2, pp. 493, 494; Stumberg, Guide to the Law and Legal Literature of France, p. 184. Double jeopardy too is not everywhere forbidden. Radin, Anglo American Legal History, p. 228.

[4] "' . . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.'"

it was recognized,

of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.[5] The extension became, indeed, a logical imperative when *once* ~~the notion was abandoned~~, *as long ago it was*, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Cf. *Near* v. *Minnesota, supra; De Jonge* v. *Oregon, supra.* Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott* v. *McNeal,* 154 U. S. 34; *Blackmer* v. *United States,* 284 U. S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell* v. *Alabama, supra,* pp. 67, 68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"?

[5] The cases are brought together in Warren, The New Liberty under the 14th Amendment, 39 Harv. L. Rev. 431.

Hebert v. *Louisiana, supra.* The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State* v. *Felch,* 92 Vt. 477; *State* v. *Lee, supra.* This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge (*State* v. *Carabetta,* 106 Conn. 114), has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment.

Maxwell v. *Dow, supra,* p. 584, gives all the answer that is necessary.

The judgment is

Affirmed.

Mr. Justice BUTLER dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.